No. 526. 221.
Brf. of Stiles for Appellee.

Office Supreme Court U.S.
FILED
JAN 7 1901
JAMES H. McKENNEY.

Filed Jan. 7, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 526.

S. D. HATFIELD AND NANCY C. RUTHERFORD,
APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

BRIEF FOR APPELLEE.

MAYNARD F. STILES,
Counsel for Appellee.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1-7-'01

IN THE

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 526.

S. D. HATFIELD AND NANCY C. RUTHERFORD, APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This is an appeal from a decree of the circuit court annulling certain instruments of writing under which the defendants claimed and which the complainant alleged were a cloud upon his title to the tract of land claimed by him, being the Robert Morris 500,000-acre grant, so called, made by the Commonwealth of Virginia in 1795 and now being in part in West Virginia.

The suit was brought in October, 1898 (p. 1 of Record). The defendants demurred (22), the demurrer was overruled (23), and decree for complainant entered (44), and defendants appeal.

The trial judge filed an opinion (24), to which this court is referred for a full statement of the case.

ARGUMENT.

The argument of the learned and able district judge is so full and his reasoning so conclusive that there seems little room for further debate of the questions considered. I shall attempt little more in support of the opinion than to refer more specifically to some of the provisions of law that sustain the conclusions of the court.

It may appear to the court upon first impression that the questions of law decided by the circuit court and now presented for review were decided and disposed of in King *vs.* Mullins, 171 U. S., 404, but it is not so. It will readily be seen upon examination that only one of the points discussed in the opinion of Judge Jackson was decided in that case adversely to this appellee. The opinion in this case is in entire harmony with King *vs.* Mullins. In the Mullins case, which was ejectment, the defense was not a claim of title in the defendant, but of title outstanding in the State by forfeiture under section 6, article 13, of the State constitution. It appeared only by inference, if at all, that the land claimed by the plaintiff had been on the land books of West Virginia. It did not appear, and no evidence was offered to show, that it in fact was on them at or after the adoption of the constitution, and that fact or the effect

of it was not before the circuit court in that case; nor did it appear that a complete redemption could not be had. This court, without deciding whether that section of the constitution was valid or invalid by itself, unsupplemented by judicial proceedings—whether the State could by force alone of its statute or constitution take absolutely the property of the citizen—held merely that the constitution, construed and applied in conjunction with the statute that required a judicial proceeding to be brought against the former owner, in which he might redeem the land by payment of the taxes, substantially satisfied the requirement of due process of law. The necessary inference from the opinion in that case, and the one generally accepted by the bar, is that in the opinion of this court the statutory provision for suit and the right of redemption or receipt of the excess proceeds of a sale of the land alone saved the provision of the constitution from being held to be not due process. The present record presents a far different situation from the Mullins case. The constitution is to be considered and construed alone, as it operates alone. Resort has been had to the statutes and judicial proceedings, and they have been exhausted so far as the land in dispute is concerned, without effect, the appellants say, upon the claim of title of either party. They contend that, at least as to the tracts of 450 and 330 acres, the title claimed by the appellee was forfeited away from Reed, appellee's grantor, and vested in their ancestor at the expiration of the year 1888. If the title to the land has been forfeited at all, it was at that time, because Reed was deprived of his property the same moment that Hatfield acquired it and by the same act or operation,

and if Hatfield acquired it, it was at that time; and, as that was long before the suit of the State and before the passage of the act under which it was brought, neither of them could have had any connection with the constitution in depriving Reed of his title, nor any instrumentality in the deprivation. The deprivation, if any there was, was by the constitution, unaided and alone, with even the right of redemption of the land claimed by the appellants by subsequent proceedings denied.

This is the situation that this court evidently foresaw might arise, calling for a decision whether the attempt of the constitution of the State, by its unaided operation, to divest absolutely and irrevocably the property of the citizen, and to transfer it to and vest it in another or in the State, is the exercise of a power lawfully belonging to a State under the National Constitution; and this is the situation that the learned district judge discloses and disposes of, as it seems to me, with irrefragable logic and irresistible force.

Before addressing himself to the main constitutional question the learned judge shows that there could be no forfeiture of appellee's land independently of the invalidity to the forfeiture provision, because that land is not within the purview and operation of the forfeiture laws.

AS TO ENTERING LAND ON THE LAND BOOKS.

The circuit court holds that section 6 of article 13 of the State constitution, which is set out in the opinion (28), which declares it to be the duty of every owner of land to have it entered on the land books, &c., has no application to land that was actually on the land books at the time that

constitution was adopted or at any time afterwards before forfeiture. There seems to be no escape from this conclusion. If a man's land was on the land books, that was the end of the matter; there was nothing for him to do under that section. The provision was directed at lands that were not then on the books, but ought to be there, and not to lands that were already properly entered; and to persons that were delinquent in that respect, not to persons who had already done what that law sought to compel. In Taylor *vs.* Burdette, 11 Leigh, cited by the court, it was held by the Virginia court to be sufficient that the land had been entered under a former act, although that act had been repealed seventeen years before the passage of the act of 1831, providing for the exclusion of patents from evidence where the land had not been entered and the taxes paid. The act of 1810 was repealed in 1814 (Hutchinson's Land Titles, 6, 7).

Judge Jackson, following the decision of Judge Tucker, holds that when the land is once on the land books no forfeiture can result from subsequent omission, as such omission must necessarily be without the fault of the land-owner. This is readily seen to be the case when the provisions and requirements of chapter 29 of the Code are considered. A few of the more pertinent sections are the following:

SEC. 8. The land books for every county shall be hereafter made out complete by the clerk of the county court of such county. In making said land books in each year he shall be governed, as far as is proper, by the copy of the land books last made out in his county used by the assessor or assessors therein in making his or their assessments for the year, and the entries made therein by him or them, and returned to him as required by this chapter. But he shall correct errors and mistakes which he may discover in any

such land books as to the names of persons properly chargeable with taxes on any tract or lot of land entered therein, and enter and charge the same with taxes thereon to the person or persons properly chargeable therewith, whether such correction be rendered necessary by the conveyance of such tract or lot by the person last charged with taxes thereon or otherwise. He shall also correct all errors and mistakes he may find in such land books as to the distance and bearing of any tract of land from the court-house or in the local description thereof, and all clerical errors of every sort which he may find therein.

SEC. 9. The clerk of the county court, in making out the land books, shall correct any and every mistake he may discover in the original land books, and if any taxes have been omitted for a former year, he shall enter the same, with lawful interest thereon, for collection.

SEC. 14. If the owner of any tract or lot of land has derived title thereto by several conveyances from the same person, or from different persons, such tract or lot shall be entered and charged with taxes on the land books as a whole, and not in different parcels.

SEC. 15. The clerk of every circuit and municipal court shall annually in the month of April, make out lists of all judgments and decrees for the partition or recovery of lands which have been rendered by their respective courts, and have not been before reported to the proper officer, stating in such list the date of the judgment or decree in each case, the land recovered and by whom, or the land which was divided, and between whom and in what parcels.

SEC. 16. The clerk of every county court shall annually, in the same month, make out a list of all lands, if any, lying in another county absolutely devised by wills recorded in his office and not before reported to the proper officers, stating in such list the date of the will in each case, when admitted to record, the names of the devisor and devisee and a description of the land devised.

SEC. 17. Every list mentioned in the two preceding sections shall be delivered or transmitted by mail by the officer making it to the clerk of the county court of the proper county.

SEC. 18. The secretary of state shall annually, in the month of April, make out and forward to the clerk of the county court of each county an abstract of all the grants issued by the State for land lying in such county not previously reported for assessment.

SEC. 23. Real estate purchased for the State at a sale for taxes, shall not be thereafter entered in the land books, but the auditor shall keep a register thereof. But when the real estate so purchased appears by the auditor's certificate to have been redeemed, the same shall be replaced in the land book in the name of the former owner, his or her heirs or his or her grantee, and the auditor shall, in the month of April in each year, certify to the clerk of the county court a list of such lands in his county as have been so redeemed within the preceding year. When real estate is sold to an individual for taxes, the clerk shall note in the land book the number of acres sold, and to whom, but shall continue the land upon said book in the name of the former owner until the purchaser obtains a deed therefor.

SEC. 24. The land specified in the lists, copies, deeds, records, abstracts and statements mentioned in the fourteenth, fifteenth, sixteenth, eighteenth and twentieth sections of this chapter, shall be transferred in the land books to the persons who appear thereby to be the owners thereof.

SEC. 26. When the owner dies intestate, his undivided real estate may be listed to his heirs without designating any of them by name until they shall have given notice to the clerk of the county court of the division of the same, the names of the several heirs, and the parcels allotted to each; and each heir shall be liable for the whole tax assessed upon such land while it is so listed; * * * Where the owner has devised the lands or a freehold estate therein ab-

solutely, the clerk shall charge such land to the devisee. If, under the will, the land is to be sold, it shall be charged to the decedent's estate, and the assets in the hands of the personal representative shall be liable for the taxes until a sale and conveyance thereof be made.

The office of the clerk of the county court contains the record of the title to all land in the county. He makes those records and he makes the land books, and the land-book entries follow every change of title. If the owner conveys the land, when the clerk records the deed he transfers the land on the land book and charges the new owner. Until the deed is recorded the land remains charged to the grantor. When the land-owner dies the land is charged to his heirs. Every mutation in title is followed, by force of the law governing the officers of the State, by a corresponding change on the land books, without the owner's intervention and in spite of it.

When the land is sold to the State for taxes it cannot be entered on the books again until it is redeemed (sec. 23); then the auditor certifies that fact to the clerk, and the land is re-entered and charged to the then record owner. While the land is thus omitted it cannot be forfeited for non-assessment (Sayers *vs.* Burkhardt, 29 C. C. A., 137; 42 U. S. A., 742).

The circuit court is therefore well warranted in holding that when a tract of land has once been properly entered upon the land books the owner should not suffer forfeiture for subsequent non-assessment, which can only result from the negligence of the officers, unmixed with any negligence or act of the land-owner.

The land of the appellee was on the land books for double

the proper amount when the constitution was adopted (8), and when it was redeemed the decree of redemption was certified to the auditor (14), and under section 23, above quoted, it was his duty to certify the redemption to the clerk of the county court without further suggestion, and of the clerk of the circuit court under section 15 to do the same thing, and of the clerk of the county court to enter and charge the land without further suggestion.

The circuit court properly holds, upon the facts shown in this case, that the appellee's land neither was nor could be forfeited, because not being within the scope of the forfeiture provision referred to.

THE STATE CONSTITUTION CONTRAVENES THE CONSTITUTION OF THE UNITED STATES.

Section 6, article 13, of the State constitution has been a good deal discussed by lawyers, principally in connection with the "King case," not having arisen more than once before, but it has been upon an erroneous idea of its scope and meaning and apparently without a candid effort to discover its true application. A critical exposition of the matter has been made for the first time by the learned and able district judge in the present case, and the opinion as to its meaning and application arrived at by him is different from the random notion commonly current that that provision applies to any land that may at any time be off the books, and to all persons who fail to resort to legal proceedings to get it back. But, in view of the possible adoption of a different construction by the State court, which would throw open a question the final settlement of which ought

not to be delayed, the learned district judge considers the forfeiture provisions, broadly applied, as contended for by the defendants, in connection with section 3, and is led to the conclusion that they are in conflict with the National Constitution, chiefly because of the direct legislative transfer of title sought to be effected thereby.

In King *vs.* Mullins this court went no further than to hold that the "system" formed by the constitution, the statute for the sale of school land, and the judicial proceeding thereunder permitting redemption and retention or recovery of the land by the former owner, afforded due process of law. It did not intimate the opinion that any separate part of that system, standing alone, was due process. The contrary is distinctly implied.

SECTION 8, act of February 28, 1893, is:

* * * "And if at any time during the pendency of any such suit it shall appear to the court that any part of any tract of land in question therein has been sold by the State in any proceeding for the sale of school lands, and the taxes regularly paid thereon since such sale, or is held by any person under section three of article thirteen of the constitution of this State, the bill, as to such part, shall be dismissed, and the suit proceeded with to a final decree as to the remainder."

Part of the land now in controversy was claimed under said section 3 and part had been "sold" in a proceeding of which no notice was given to the owner and of which he had no knowledge—an *ex parte* application of the commissioner of school lands. The suit was not dismissed because these facts did not happen to come to the notice of the court.

Now, although the person representing the State may inadvertently bring a suit against land and the person in whose name it ought to have been charged with taxes, if that suit must be dismissed, in whole or in part, and cannot go on to final hearing when it appears that some other person claims the land, in whole or in part, under a certain hostile color of title, that suit and the statute that authorizes it, to the extent that the suit must be dismissed, can by no fair construction be any part of the process by which the land-owner is deprived of his property. The very ground of the dismissal is that he has already been deprived before the suit and without it. As said by the supreme court of Kentucky in Gaines *vs.* Buford, 1 Dana, 488:

* * * "The forfeiture was the result of nothing done in that suit. The verdict and judgment formed no condemnation upon which to base it, and from which it could follow as an incident. They were themselves but the result of a forfeiture theretofore incurred, and of a divestiture of title which had theretofore taken place. The court and jury were not a means for carrying into effect what the legislature had commanded, but acted upon what it was supposed the legislature of itself had already done. The title passed from Gaines on the 2nd of August, 1825, long before this trial, or it is still in him."

The court is without discretion and the land-owner without power or help; the suit is dismissed. "The judges sit to execute legislative judgments and decrees, not to declare the law and administer the justice of the country."—Mr. Webster in the Dartmouth College Case, 4 Wheat., 578.

The deprivation as to land that cannot be redeemed or as to which the suit must be dismissed without going into the

merits, and the transfer of title to the adverse claimant, is not by the judicial proceeding, but by prior operation of the constitution alone; and by every reason and authority that is not due process of law, as the learned district judge holds and as this court has distinctly implied and will surely hold.

This court has so often sustained the doctrine laid down by the district judge in this case that it is needless to multiply quotations; but a pertinent idea is well expressed by Chief Justice Lindsay in Marshall *vs.* McDaniel, 12 Bush. (Ky.), 378, in disposing of a similar act, thus:

"We conclude without hesitation that so much of the act of 1825 as provided that for a mere failure to list lands for taxation the title should be forfeited, and should *ipso facto*, without inquiry or trial, and without opportunity to the party supposed to be in default, even to manifest his innocence, be vested in the Commonwealth, is unconstitutional and void.

"To deny to the legislature the power to work forfeitures for the non-listing of property for taxation, by the mere inherent force of the legislative enactment, is not to question its rights to provide that without judicial proceedings it may cause property to be assessed, taxes to be levied, tax precepts to be issued, and the tax-payer's property to be seized and sold for the purpose of enforcing collections. * * *

"But when the Commonwealth, instead of thus subjecting to sale the delinquent tax-payer's property, or so much as may be necessary to raise his proportion of the public burden, undertakes to treat his delinquency as a crime, and to punish him by forfeiting his estate, the constitutional guarantee which secures to a citizen the right to be heard before his freehold shall be seized or he be condemned, and to be proceeded against in accordance with 'the law of the land,' applies, and the courts cannot, in deference to the legislative

department of the Government, hesitate to vindicate the constitutional rights of the individual."

Under the West Virginia law the owner is not given an opportunity to be heard until *after* his freehold is seized, nor even then where there is an adverse claimant under section 3.

The circuit court does not deny to the State of West Virginia the possession of all the power of taxation that is possessed by any State, or that was possessed by the Crown in England before the Revolution; but the power to take property by sheer act of legislation, *because it was not taxed*, and to bestow it upon a private person is a power that never was claimed by the English Crown (Bennett *vs.* Hunter, 18 Gratt., 100) and that cannot exist where "due process of law" is required.

Let the whole of article 13 of the constitution of the State and all kindred legislation be entirely abolished, and the taxing power of the State would not in the least be impaired or affected; for under her existing general revenue laws this State exercises as complete taxing power as any State in the Union. If, in addition to her proper and ordinary taxing power, she has the further power under the National Constitution to confiscate property when not taxed for five years or for any greater or less period, and to bestow it upon private persons, every other State and Congress has the same power, and private property is held subject to the will or caprice of legislative bodies, unprotected by the judicial power. This court has not even intimated in King *vs.* Mullins or elsewhere that such a power exists, and without it the contention of the appellants cannot be sustained. The circuit

court holds in effect that the attempted confiscation is not taxation, but land robbery.

Mr. Cooley states a truth when he says: "The basis of all taxation is political necessity." He might well have added that its only legitimate object is the raising of money for public purposes.

There can be no political necessity for taxation except to provide means for carrying on government. What can be the political necessity or other justification, considered from a revenue standpoint, of forfeiting or confiscating land instead of taxing it and of distributing it to private persons for private purposes, instead of exacting from it its just and proportionate contribution to the general support of government, leaving the residue to the owner? How is it better or easier, viewed from a revenue standpoint, to forfeit land for private uses than to tax it for public purposes? A provision of law that does not in terms attempt nor in operation result in the production of revenue to the organization for whose benefit it purports to be is not taxation, whatever be the name given to it. A sentence of confiscation cannot be made taxation, nor even legislation, by calling it such, nor be justified thereby.

Judge Jackson does not in his opinion attempt to trench upon the ruling of this court that the constitution, statute, and judicial proceedings thereunder and the right of redemption therein given constitute, *where they all apply*, a valid system; but he holds and clearly shows that only the constitution applies where land is claimed under section 3 or where the suit must otherwise be dismissed and redemption denied or made ineffectual, if or where the constitution applies at all.

The ruling of the circuit court, if followed and sustained by this court, will not have the effect of taking from the State any taxing power nor a dollar of revenue. On the contrary, if the land-owner is permitted to redeem *all* his land that is called forfeited instead of only such as is not claimed adversely to him, it is manifest that the revenues of the State would be increased instead of diminished thereby.

Nor can any injustice be done to the adverse claimant by permitting the land-owner to redeem his title instead of its being transferred to the adverse claimant. The State owes to the adverse claimant only the equal protection of the laws—an opportunity to measure in the courts the strength of his title and possession upon equal terms with his opponent; not to receive his opponent's title as a gift from the State. Claims to land not based upon title originally superior nor made superior by adverse possession for the short statutory period of ten years are without merit. Courts and the States owe to the Constitution a higher obligation than they do to persons, be they few or many, who, being without valid title, may desire to receive, as a gratuity from the State, the title of another. The "settler" is in a position of indifference, for the statute of limitations has long ago taken care of him. The man who worries about the "home of the settler" is not the settler himself, but the speculator in wild land bought from the commissioner of school lands *ex parte*. Under said section 3 possession by the adverse claimant is not necessary to vest forfeited title in him where the claim and color of title is derived from the State. Payment of taxes for five years is enough. Nor does occupancy prevent forfeiture. Land actually occupied, cultivated, and improved can be forfeited

and the title thereto, improvements and all, transferred to and vested in the holder of a previously worthless color of title without possession—if the appellants are right and the circuit court wrong in their views of the law.

SECTION 6 OF ARTICLE 13 OF THE STATE CONSTITUTION CONTRARY TO THE EQUALITY CLAUSE OF FOURTEENTH AMENDMENT.

This objection to the forfeiture of tracts of 1,000 acres and more and not tracts of less size is sustained by the district judge in his opinion on the strength of the ruling of the State court that there is no ground for discrimination.

Section 39 of the act of April 9, 1873, referred to, is a reenactment of section 6 of article 13 of the constitution, with a further and like provision relating to tracts of less than 1,000 acres. The act uses the same expression as the constitution: "When for any five successive years after the year 1869, the owner of any tract of land containing one thousand acres or more shall not," &c.; "and when for any five successive years after the passage of this act, the owner of any tract of land less in quantity than one thousand acres," &c. In both clauses the word used is "after." This act was amended and re-enacted by an act passed for that purpose March 24, 1882, and although the language of the former act was followed so far as it related to tracts of more than 1,000 acres, as to tracts of less it is as follows: "And when for any five successive years since the ninth day of April, one thousand eight hundred and seventy-three, the owner of any lot or tract of land, less in quantity than one thousand acres," &c. The only change is from

"after" to "since." The act of 1873 applied to all time after its passage; the act of 1882 applied to the time from April 9, 1873, up to the taking effect of the act of 1882, and not to time "after" the act (Stand. Dic.). This change could not have been accidental, but even if so, it had the effect, so far as it was effectual, to confirm prior forfeitures, but not to make future ones, as to tracts less than 1,000 acres. The act of 1873 was doing all that could be done in that direction by legislation.

There being, as was held in State *vs.* Swan, 46 W. Va., no good ground for the distinction made by section 6 of article 13, it is invalid as being class legislation.

Gulf, Colo. & Santa Fe R'y *vs.* Ellis, 165 U. S., 150.
State *vs.* Loomis, 115 Mo., 307.
State *vs.* Goodwill, 33 W. Va., 179.

If we suppose two men, neighbors, one having a tract of land of 999 acres and the other a tract of 1,000 acres, and both unassessed for the required time, it is not easy to see any good reason why they should fare differently and one tract be forfeited and perhaps vested in a stranger and the other not forfeited.

EXCESSIVE FINES AND CRUEL AND UNUSUAL PUNISHMENT.

Excessive fines and cruel and unusual punishment are contrary to the "old constitutional law of the land" in England, IV Blackstone's Coms., 379, and therefore prohibited to the States by the fourteenth amendment, as it is to the General Government by the eighth amendment. If, then, the forfeiture is to be regarded as in any sense a penalty, the

opinion of the supreme court of Kentucky in Gaines *vs.* Buford, 1 Dana, 480, upon an act that attempted to forfeit land for failure to make improvements, is pertinent. The court, per Judge Nichols, said:

"Thus, by comparing the act of 1824 with the Constitution, I find that while the legislature are expressly prohibited from passing laws to forfeit the estates of attained traitors and felons, except during life, they have undertaken to forfeit forever the estates of those who have been guilty of no crime, unless it be a crime to have the better title to a tract of land held adversely by another. This contrast fortifies my conviction that the legislature does not possess the power to pass a bill of forfeiture like this. When the estate of an attained felon can only be forfeited during life, is it not within the contemplation of the supreme law, an excessive fine or a cruel punishment to forfeit forever the estate of a man, merely because he is unwilling and fails to improve it, even if he could? The Constitution says 'that excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.'"

IMPAIRING THE OBLIGATION OF CONTRACT.

If we take the other horn of the dilemma and say the forfeiture is not a penalty, we encounter the objection that the Constitution impairs the obligation of the contract of Virginia with Robert Morris, his heirs and assigns, which was an unconditional grant of the land, and again we quote from the opinion of the Kentucky court in the same case:

"The act of 1824, now in question, does not treat the failure to improve as there required as a criminal or penal offense. The forfeiture is not placed upon the ground of punishment for a criminal act of commission or omission; but the whole tenor of the statute shows that the legislature

conceived they had constitutional power to require the citizen to improve his land as a condition upon which it should be held. It is an attempt to change the tenure of the property—to make the holding depend upon improvement as a new condition annexed to the estate instead of letting it rest upon the original contract. * * * The attempt thereafter by the vendor to resume the control is in violation of the manifest purpose and design of the contract and strikes at its essence."

CONCLUSION.

The land in controversy belongs either to the appellee or to the appellants. It is undisputed that immediately before the expiration of the year 1888 it belonged to Reed, the appellee's grantor, and not to Hatfield. Immediately after the expiration of that year it belonged, the appellants contend, to Hatfield and not to Reed. Hatfield did nothing to acquire the land. To reverse the decree in this case it is necessary to hold that the State constitution by force of its own operation alone effected the transfer of title—to hold that under the Constitution of the United States a State may by act of a legislative body deprive one private person of his property and give it to another, and that in the present case has actually done so; but this court, in Davidson *vs.* New Orleans, 96 U. S., 102, denies that "a State can make anything due process of law which by its own legislation it may choose to declare such. To affirm this," says the court, "is to hold that the prohibition to the State is of no avail or has no application where the invasion of private rights is effected under the form of State legislation." This would indeed make the mere will of a State superior to the national Constitution. To the same effect are Murray's Lessee *vs.*

Hoboken, 18 How., 276; Holden *vs.* Hardy, 169 U. S., 366; Ulman *vs.* Mayor, &c., of Baltimore, 72 Md., 587. The "operation" of the State constitution is neither due process nor any process of law whatever; it is a sentence of confiscation, of attainder.

The court is further referred to the following cases as having special bearing upon the questions involved herein:

Wong Wing *vs.* U. S., 163 U. S., 228.
Scharf, com'r, &c., *vs.* Tasker, 73 Md., 380.
Fisher *vs.* McGirr, 1 Gray, 1.
Boggs *vs.* The Commonwealth, 76 Va., 986.
Griffin *vs.* Mixon, 38 Miss., 424.
Hoke *vs.* Henderson, 4 Dev. Law.
Arrowsmith *vs.* Burlingin, 4 McLean, 494.
Kinney *vs.* Beverly, 2 Hen. & Munf., 318.
Barber *vs.* Nelson, 1 Lit., 60.

The opinion of Judge Jackson in this case is worthy of great consideration, both on account of its intrinsic force and on account of his long and intimate acquaintance with all laws affecting titles to lands in the Virginias. His biography would be a history of the land law of those States.

As was lately said by the public press upon his entering upon his fortieth year of continuous service upon the Federal bench without having missed a term of court in all that time:

"His experience has been a wonderful one. He has probably decided more questions of law than any other man living in this country; has had more to do with settling the titles to the lands in West Virginia than any other man who ever lived."

I cannot believe this court will have any difficulty in reaching the same conclusion that he has reached: that so far as the constitution or statutes of West Virginia undertake to forfeit land and vest the title thereto in another private person or vest it in the State, without the right of redemption, they are void as not "due process of law."

It is respectfully submitted that the decree of the circuit court should be affirmed.

MAYNARD F. STILES,
Counsel for Appellee.